

# MICHIGAN

## MILLIKEN v. GREEN:

### BREAKING THE LEGISLATIVE DEADLOCK

ELWOOD HAIN\*

The major purpose of a symposium such as this is to analyze a problem or a field from a variety of perspectives. A minor purpose, however, may be to provide a modicum of factual information—to report on recent developments. This article on the Michigan experience is aimed at fulfilling the minor purpose of reporting events. Hopefully, persons contemplating school finance litigation or legislation can benefit from insights drawn from Michigan's experience.

#### I

#### REFORM AND THE COURTS

##### A. The Preliminaries

When the Michigan school finance suit, *Governor v. State Treasurer*,<sup>1</sup> was started in 1971, Michigan's deductible-millage system<sup>2</sup> of school finance was typical of that in many states. Under this system wealthy districts could spend more per pupil while making less of an effort to tax than poor districts.<sup>3</sup> In 1971, the richest district in Michigan had a "state equalized valuation" (SEV)<sup>4</sup> of \$405,747 per pupil, while the poorest had an SEV of

---

\*Assistant Dean and Professor of Law, Wayne State University; co-counsel for intervenors in *Governor v. State Treasurer*, the Michigan school finance case.

<sup>1</sup> 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W. 2d 711 (1973). The case is styled *Milliken v. Green* in the unofficial reports and in the circuit court records.

<sup>2</sup> Essentially, the deductible-millage formula consisted of a guaranteed minimum dollar amount per pupil for districts levying the minimum qualifying tax and a continuing but declining state subvention for districts able to raise more than the minimum through local taxation. The formula consisted of a gross allowance or foundation program from which was subtracted the amount a given millage would raise in the district. In 1970-71, the base year for purposes of the trial, there were two formulas, one for districts with less than \$15,500 of taxable property per pupil, and the other for districts with \$15,500 or more per pupil. Districts in the first category received a gross allowance of \$623.50 minus the amount a tax of 20 mills would have raised locally. Districts in the second group received a gross allowance of \$530.50 less the revenue from a hypothetical 14 mill tax. Neither deductible-millage bore any necessary relationship to the actual millage in the district. To qualify for full state aid under the formula, a district was required to levy at least a 12 mill tax. See *Governor v. State Treasurer*, 389 Mich. at 18 n.3, 203 N.W.2d at 464 n.3; G. CAESAR, R. MCKERR & J. PHELPS, *NEW EQUITY IN MICHIGAN SCHOOL FINANCE* (Mich. Sen. Comm. on Educ., 1973) [hereinafter cited as *NEW EQUITY IN MICHIGAN SCHOOL FINANCE*].

<sup>3</sup> See generally J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

<sup>4</sup> In Michigan, all property assessments for purposes of ad valorem taxation are to be at fifty per cent of the true cash value. The state provides a system to assure equalization of assessments between political subdivisions of the state. See MICH. CONST. art. 9, § 3; MICH. COMP. LAWS ANN. §§ 209.4, 211.34 (1967). See generally Comment, *The Michigan Property Tax: Assessment, Equalization, and Taxpayer Appeals*, 17 WAYNE L. REV. 1397 (1971).

only \$2,165 per pupil. Naturally the disparities carried over into expenditures: total operating expenditures per pupil in 1971 ranged from \$541 to \$1,427, and instructional expenditures per pupil ranged from \$398 to \$1,109.<sup>5</sup>

School finance reform was believed to be a popular issue with the electorate, although the legislature had been unable to agree on any particular reform plan. The present Governor, William Milliken, a Republican, had made the reform of educational financing a priority item in his first term of office, taking a strong stand as early as 1969.<sup>6</sup> Despite a major professional study of Michigan finances<sup>7</sup> and the work of a blue-ribbon citizens' study commission,<sup>8</sup> he had made little progress with his legislative program by 1971. When the California Supreme Court decided *Serrano v. Priest*,<sup>9</sup> the Governor saw a possible alternative route to the same goal.

While the Governor's aides were considering the possibilities raised by *Serrano*, Attorney General Frank Kelley, widely believed to be planning a race for the United States Senate seat of Republican Robert Griffin, and therefore seeking an opportunity to champion the interest of the majority against entrenched privilege, was similarly engaged. While attorneys general normally enter the courtroom in defense of state laws, Attorney General Kelley reasoned that he had a higher duty to defend the Constitution. When Milliken and Kelley each learned that the other was planning a suit to challenge the state school finance laws, they negotiated an uneasy alliance. At a joint press conference held on September 30, 1971, they announced that the Attorney General would sue on behalf of both officials.<sup>10</sup>

After the suit was announced but before it was filed, all political calculations were endangered by United States District Judge Stephen Roth's finding that Detroit's schools had been segregated as a result of state and local action.<sup>11</sup> Judge Roth ordered the state defendants in the desegregation case, including both Kelley and Milliken, to prepare a plan for desegregating the schools of the Detroit metropolitan area. The resulting public confusion between the finance case and the desegregation case haunted both Milliken and Kelley in subsequent elections. It may have been a significant factor in Kelley's 1972 loss in the U. S. Senate race,<sup>12</sup> and in the defeat of a November, 1971, referendum proposal to amend the state constitution to require centralized state funding of education.<sup>13</sup>

When Milliken and Kelley filed their complaint for a declaratory judgment

<sup>5</sup> See *Governor v. State Treasurer*, 389 Mich. at 19, 203 N.W.2d at 464; *Milliken v. Green*, No. 13664-C (Cir. Ct. Ingham County, Mich., May 8, 1972) (Findings of Fact, IV, 2).

<sup>6</sup> NEW EQUITY IN MICHIGAN SCHOOL FINANCE 13.

<sup>7</sup> J. THOMAS, SCHOOL FINANCE AND EDUCATIONAL OPPORTUNITY IN MICHIGAN (1968).

<sup>8</sup> GOVERNOR'S COMMISSION ON EDUCATIONAL REFORM, REPORT (Sept. 30, 1969).

<sup>9</sup> 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

<sup>10</sup> Detroit Free Press, Sept. 30, 1971, at 9, col. 1; *id.*, Oct. 1, 1971, at 14, col. 1.

<sup>11</sup> *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir.), *cert. granted*, 42 U.S.L.W. 3306 (U.S. Nov. 20, 1973) (No 73-434). The case is presently awaiting a decision by the United States Supreme Court as to the propriety of ordering a multi-district remedy for school segregation within a single district.

<sup>12</sup> A major issue in the campaign was which candidate was most ardently and effectively opposed to "busing."

<sup>13</sup> See NEW EQUITY IN MICHIGAN SCHOOL FINANCE 15-17.

in the Circuit Court of Ingham County, it was obvious that the case had been built upside down. The two plaintiffs logically should have been defendants. The Governor based his standing as a plaintiff on a constitutional provision authorizing him to sue on behalf of the people to end unconstitutional or illegal practices by public officers, but forbidding him to sue the legislature.<sup>14</sup> The Attorney General's standing was even more tenuous, based as it was on two statutes that on their face dealt only with venue.<sup>15</sup>

The State Treasurer, who was named as a defendant, was a more logical party than either of the two plaintiffs.<sup>16</sup> His role in the legislative plan was ministerial but crucial. He signed the state aid checks, although the amount was predetermined by legislative formula. However, the choice of the defendant school districts, three "lighthouse" districts in the Detroit suburbs, was not obvious. On the one hand, all had large per pupil tax bases, middle and upper-middle class residents, and above-average expenditures. On the other hand, they were not low tax effort districts: one of them levied a tax equivalent to the statewide average, and the other two had higher than average taxes. None of the defendant districts was, in terms of SEV per pupil, the richest in the state, nor, for that matter, even in the Detroit metropolitan area. The richest districts in Greater Detroit are educationally less prestigious districts with large industrial tax bases, blue-collar residents, and low taxes; these districts were not joined.<sup>17</sup>

The complaint of Milliken and Kelley sought a declaratory judgment that Michigan's deductible-millage system denied the equal protection of the laws guaranteed by both the state constitution<sup>18</sup> and the fourteenth amendment<sup>19</sup> to school children and property taxpaying parents of school children in low SEV per pupil districts. The taxpaying parents, it was reasoned, were forced to pay higher taxes than parents in districts with larger tax bases to obtain similar levels of educational expenditures. As to the children, the plaintiffs simply asserted that the failure "to equalize expenditures

<sup>14</sup> MICH. CONST. art. 5, § 8.

<sup>15</sup> Complaint, ¶ 2, *citing* MICH. COMP. LAWS ANN. §§ 14.102, 600.1631 (1967). Parents and taxpayers from poor districts intervened before the start of the trial, thus enabling the supreme court to avoid a decision on the standing of the initial plaintiffs. 389 Mich. at 35, 203 N.W.2d at 472. There were two other intervenors generally allied with the plaintiffs: a resident (and former school board member) of a district near the median in wealth and a resident of a high valuation district.

<sup>16</sup> Curiously, both the Governor and the Attorney General, as plaintiffs, and the Treasurer, as defendant, were represented by deputy attorneys general. Before the final decision by the supreme court, the legislature appropriated funds for the legal expenses of the defendant school districts. So far as I know, no one has suggested that this might have made the suit technically a collusive one. Quite clearly, however, the attorneys assigned to the case were not actually in collusion.

<sup>17</sup> The school district defendants protested that the suit was in fact, although not in form, against the legislature, the only agency with power to give relief. They also asserted that the suit, thus disguised, could have been brought against any school district in the state. Consequently, they argued, there was no case or controversy. *See* Brief for Dearborn City School District at 22-23; Brief for Grosse Pointe Public School System at 30-31. In its initial decision, the Michigan Supreme Court responded that as high valuation districts benefiting from the school finance system's inequities, they were appropriate parties. 389 Mich. at 35, 203 N.W.2d at 472.

<sup>18</sup> MICH. CONST. art. 1, § 2.

<sup>19</sup> U.S. CONST. amend. XIV, § 2.

per pupil among school districts" was a denial of equal protection of the laws.<sup>20</sup>

### B. Chronology

Events moved rapidly after the suit was filed. The school district defendants, but not the Treasurer, attempted to remove the case to the United States district court, but that court denied the request on the grounds that all parties to the dispute were officers or instrumentalities of the state and that serious questions of state constitutional law were involved.<sup>21</sup> Shortly thereafter, in an effort to speed the judicial process, the Governor addressed an executive message to the Michigan Supreme Court, asserting that the case involved controlling questions of public law that required early adjudication and requesting the court to give an early hearing to the case. After a month's deliberation, the court agreed, one judge dissenting, and ordered the trial court to conduct a hearing to develop the facts and to certify the controlling questions of law to the supreme court within ninety days.<sup>22</sup> The certified questions, as set out in the Governor's message, differed from the original complaint. They still invoked the state and federal equal protection clauses, but changed the focus from uneven expenditures per pupil to uneven revenue raising ability. In addition, there was no mention of the interests of parents and taxpayers.<sup>23</sup> It is possible that plaintiffs changed the focus of their argument to offer the court a rationale leading to a remedy other than centralized state funding<sup>24</sup>—which the electorate had just rejected by an impressive margin.

Before the fact-finding hearing began in late March, 1972, the supreme court extended the time for filing the trial court's findings of fact first to April 24, and subsequently to May 8. The addition of intervening parties plaintiff<sup>25</sup> caused little delay in the proceedings, as they left almost the complete conduct of the trial to the Attorney General's staff, but the constant pressure of an early deadline for concluding the hearing foreclosed the possibility of a full examination of the issues and their factual premises. In

<sup>20</sup> Complaint, ¶¶ 22, 23. The complaint did, however, distinguish certain unequal expenditures, e.g., for compensatory education, as rationally justified and therefore constitutional. *Id.* ¶ 19.

<sup>21</sup> *Milliken v. Green*, No. G-303-71-C-A (W.D. Mich., Nov. 16, 1971).

<sup>22</sup> *In re* Executive Message of Governor, No. 53809 (Mich., Jan. 4, 1972). See MICH. GEN. CT. R. 797.

<sup>23</sup> The two questions were identical except for the constitutional provision relied upon. The first question was:

Does the Michigan public school financing system, consisting of local, general ad valorem property taxes and state school aid appropriations, by relying upon the wealth of local school districts as measured by the state equalized valuation of taxable property per student which results in substantial disparities of revenue produced per student, invidiously discriminate against and deny substantially equal educational opportunity to students in violation of the equal protection of the laws guaranteed by Article 1, Section 2, of the Michigan Constitution?

Executive Message of Gov. William G. Milliken, Dec. 3, 1971. The second question cited the federal equal protection clause, U.S. CONST. amend. XIV, § 2. The complaint was subsequently amended, but only to acknowledge the passage of time in the budgetary process, not to conform the complaint more closely to the certified questions.

<sup>24</sup> See text accompanying notes 37-39 *infra*.

<sup>25</sup> See note 15 *supra*.

fact, the trial court, with the assistance of the parties, was able to prepare any sort of findings only because of the belated extension to May 8. The defendants were especially hampered in developing their case in the closing days of the hearing, but the entire process suffered from the press of time. Witnesses were omitted or were not fully examined, and some useful lines of testimony were never developed.<sup>26</sup>

It is difficult to gauge the effect of deadlines, but the pressure continued unabated even after the hearing. The trial court had only one and a half weeks to prepare its findings of fact. The briefs of plaintiffs and intervenors were due in the supreme court two weeks later; the defense had eleven days to reply. Oral argument took place three days thereafter, on June 6, 1972. This amazing schedule did not, however, end with a quick decision. The supreme court issued its opinion on December 29, 1972, almost seven months after oral argument and only two days before two members of the court left for private life.<sup>27</sup> The court was divided 4-3 in ruling for the plaintiffs. The departing justices had voted on opposite sides of the case. A motion for rehearing was inevitable. It was granted by a 4-3 vote that saw the two new justices voting with the remaining dissenters.<sup>28</sup> After briefs were submitted on rehearing, there was a ten-month silence during which the United States Supreme Court decided *Rodriguez*<sup>29</sup> and the Michigan legislature adopted a power equalizing finance system.<sup>30</sup> Finally, in December, 1973, two years after the Governor certified the "controlling questions of public law which are of such moment as to require early determination,"<sup>31</sup> the court disposed of the case without rendering an opinion on the merits.<sup>32</sup>

### C. Trial Strategies

The Attorney General and the Governor, through their attorneys, had not by the time the case went to trial, unequivocally adopted an "equal expenditures" posture, despite the wording of the complaint. Neither had they clearly adopted Proposition I<sup>33</sup> as implied by the certified questions. But they had adopted an "input" theory of equality rather than an "output" theory,<sup>34</sup> and they set out to demonstrate the disparity of income-raising ability

<sup>26</sup> One example will suffice: the intervenors from poor districts felt constrained not to call two school superintendents of low valuation districts to explore what they could do with specific increases in per pupil funds.

<sup>27</sup> See the bitter dissent of Justice Brennan, 389 Mich. at 38-40, 203 N.W.2d at 474.

<sup>28</sup> Governor v. State Treasurer, No. 53,809 (Mich., Jan. 30, 1973).

<sup>29</sup> San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

<sup>30</sup> Mich. Pub. Act No. 101 (1973). The power equalizing system is described at pp. 361-62 *infra*.

<sup>31</sup> Executive Message of Gov. William G. Milliken, Dec. 3, 1971.

<sup>32</sup> Governor v. State Treasurer, 390 Mich. 398, 212 N.W.2d 711 (1973).

<sup>33</sup> Proposition I, as formulated by Messrs. Coons, Clune, and Sugarman, says simply that "the quality of public education may not be a function of wealth other than the total wealth of the state." J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 304 (1970). See also Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 311 (1969).

<sup>34</sup> The "input" theory emphasizes inequalities in the resources devoted to education, such as amounts of money spent per child, teacher salaries, student-teacher ratios, number of library books per child, or number of elective courses. An "output" theory focuses on the educational

and the resultant disparity of expenditures. They relied heavily on statistical data which are readily available in Michigan.<sup>35</sup> Their most effective evidence compared the impact of the finance system on specific districts. It was demonstrated, for instance, that neighboring districts in fact raised widely disparate sums at almost identical tax rates and that specified "rich" districts achieved expenditure levels comparable to nearby "poor" districts but with much less tax effort. They also introduced testimony and statistical evidence that "high SEV, high expenditure districts offer a broader range of educational opportunities to boys and girls in terms of broader curricular offerings, smaller classes, more highly trained or experienced teachers and more instructional materials including libraries and audiovisual equipment."<sup>36</sup>

Plaintiffs' shift in focus from unequal expenditures, as charged in the complaint, to unequal revenue raising ability, as certified to the supreme court, may have occurred because the expenditure approach dictates a remedy of equal expenditures—which almost inevitably requires centralized state funding. The expenditure theory does not allow for alternative definitions of equality, so other remedies, premised on those alternative definitions, become unavailable.<sup>37</sup> This is not to disparage a definition of equality in terms of expenditures or to deny the advantages of centralized funding. The definition has the advantage, not present in a power equalizing definition,<sup>38</sup> for example, of focusing on the deprivation of the child without requiring accommodation of the interest of local voters in expenditure levels.<sup>39</sup> On a practical plane, centralized state funding, at least in Michigan, has much to recommend it over power equalizing or vouchers.<sup>40</sup> But as a matter of litigation strategy,

---

product—how well pupils perform according to some standard of achievement. While equality of educational output may well be a more desirable equality than equality of input, a complaint cast in terms of output is almost certainly non-justiciable, and an effective judicial remedy is hard to imagine. See *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969); J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 311-15 (1970). But see Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147, 1166-72 (1966).

<sup>35</sup> See, e.g., MICH. DEP'T OF EDUC., *RANKING OF MICHIGAN PUBLIC HIGH SCHOOL DISTRICTS BY SELECTED FINANCIAL DATA, 1970-71* (Bulletin No. 1012, 1971).

<sup>36</sup> Brief for Plaintiffs at 22.

<sup>37</sup> See Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 338-45 (1969).

<sup>38</sup> "District power equalization" is a plan which has as its goal discarding property wealth as the determinant of a district's expenditure level. Under such a plan, local tax rates are the sole determinant of a district's expenditures. If the state's guaranteed expenditure level for the tax rate selected cannot be met because local property values are too low, the state must supply the difference. Conversely, if the tax levy produces more than that guaranteed by the state, the difference (surplus) reverts to the state. See J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 240-42 (1970).

<sup>39</sup> But see *id.* at 14-23.

<sup>40</sup> The voucher proposal would involve giving parents vouchers redeemable for a specified maximum sum per child per year which could be spent only on "approved" educational services, that is, parents would be free to spend this sum to purchase educational services from an "approved" institution of their own choice. M. FRIEDMAN, *CAPITALISM AND FREEDOM* 89 (1962). See also CENTER FOR THE STUDY OF PUBLIC POLICY, *EDUCATION VOUCHERS* (1970); Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CALIF. L. REV. 321 (1971).

The primary advantage of centralized funding would be that the level of spending for education would be a function of neither local personal income levels nor the cost of municipal services supplied by general purpose local governments. There are obvious disadvantages as well: an in-

a theory which allows only the remedy of centralized funding leaves the judiciary with very few options.

The defense strategy was multifaceted. In addition to disputing the legal premises of the plaintiffs, defendants insisted that educational equality could be defined only in "output" terms. Again, there were readily available statistical data alleged to indicate "output": the scores of fourth and seventh grade pupils on achievement tests administered under the Michigan Educational Assessment Program (MEAP).<sup>41</sup> The key to defendants' factual case was expert testimony that the differences in composite achievement from district to district correlated more highly with socioeconomic status (SES), a "non-school" factor, than with various "school inputs" such as total instructional expenditures per pupil or teacher salaries.<sup>42</sup> By the time the defense began presenting its evidence, however, time was desperately short. That undoubtedly hampered the defendants' case, but the plaintiffs' lawyers were also frustrated, because they had almost no opportunity to probe the many soft spots in the affirmative defense. The statistical methodology used by the defense's statistician, the suspect nature of the socioeconomic data used, the nature and limitations of the MEAP testing program, the concept of education implicit in a testing program limited to mathematics, reading, and grammar—these were only some of the areas inadequately explored due to the draconian time limit imposed by the supreme court.

#### D. The Opinions

Although the initial decision in *Governor v. State Treasurer* was vacated thirty-two days after it was issued, the approach the court took in that decision is probably informative for those who wish, through litigation, to reform school finance in other states. It is a study in the potential of state constitutional provisions for affording relief from inequitable school finance systems. The second, and dispositive, opinion is more obviously relevant to prospective litigants elsewhere, but for the less than obvious reason that it is not a decision on the merits at all.

##### 1. *The First Decision*

The majority opinion by Justice G. Mennen Williams began, ominously for the plaintiffs, by accepting the defendants' contention that the un rebutted evidence showed that the quality of a child's education was *not* a function

creased likelihood that decision-making power would also be centralized, and the loss of the ability of communities to choose the amount they wish to invest in education, to name but two.

<sup>41</sup> MICH. DEP'T OF EDUC., PURPOSE AND PROCEDURES OF THE MICHIGAN ASSESSMENT OF EDUCATION, ASSESSMENT REPORT NO. 1 (1969) [1969-70 MEAP]; MICH. DEP'T OF EDUC., LEVELS OF EDUCATIONAL PERFORMANCE AND RELATED FACTORS IN MICHIGAN, ASSESSMENT REPORT NO. 4 (1970) [1969-70 MEAP]; MICH. DEP'T OF EDUC., LEVELS OF EDUCATIONAL PERFORMANCE AND RELATED FACTORS IN MICHIGAN, A SUPPLEMENT, ASSESSMENT REPORT NO. 9 (1970) [1969-70 MEAP]; MICH. DEP'T OF EDUC., LEVELS OF EDUCATIONAL PERFORMANCE AND RELATED FACTORS, THE FIFTH REPORT OF THE 1970-71 MICHIGAN EDUCATIONAL ASSESSMENT PROGRAM (Working Draft, Dec. 1971) [1970-71 MEAP]; MICH. DEP'T OF EDUC., MICHIGAN EDUCATIONAL ASSESSMENT PROGRAM, 1970-71 RANKING OF MICHIGAN K-12 SCHOOL DISTRICTS ACCORDING TO STATE EQUALIZED VALUATION PER RESIDENT MEMBER (1971).

<sup>42</sup> See Brief for Grosse Pointe Public School System at 12-14, 19-28.

of the wealth of the district in which he resided.<sup>43</sup> The court seems to have accepted the results of the fourth and seventh grade standardized tests as an appropriate gauge of the quality of education. In addition, it must have either not understood or not accepted the plaintiffs' assertion that the low correlations of wealth and achievement were nevertheless statistically significant.<sup>44</sup> In both respects it is possible—though certainly not demonstrable—that a less hurried trial would have resulted in a differently informed court.

The court was not, in fact, disposed to pursue the educational quality issue. Rather, it narrowed the issue to one of equality of financial support, implicitly adopting the plaintiffs' position that the issue was one of input rather than output. The court did this, however, by adopting a line of reasoning not suggested by the briefs. It reasoned that the state constitutional command that "[t]he legislature shall maintain and support a system of free public elementary and secondary schools as defined by law,"<sup>45</sup> together with the state equal protection clause, required that school districts be provided equal *financial* support and maintenance.<sup>46</sup> After surveying a long line of cases holding that education in Michigan is a state, not a local, function, the court discussed the usual statistical evidence showing that education funds per pupil varied drastically from district to district, that the variance was largely a function of unequal property tax bases and the state aid formula, and that poor districts were absolutely precluded from spending the sums some rich districts spent.<sup>47</sup>

The equal protection analysis built on this factual foundation explicitly eschewed reliance on the United States Constitution,<sup>48</sup> but rather claimed to apply only state constitutional law. It nevertheless employed both the "rationality" and the "compelling state interest" tests—but as a matter of state law. In ruling that, for Michigan at least, education was a fundamental interest, the court made effective use of state constitutional and legislative materials.<sup>49</sup> By contrast, in deciding as a matter of Michigan law that wealth was the criterion of classification used by the school finance statute and that it was a suspect classification, the court relied entirely on federal cases,<sup>50</sup> giving them a wider reading than the United States Supreme Court was to do in *Rodriguez*. The Michigan court rejected local control of education as an interest compelling enough to justify the dis-

---

<sup>43</sup> 389 Mich. at 10-11, 203 N.W.2d at 460.

<sup>44</sup> Brief for Plaintiffs at 27-29.

<sup>45</sup> MICH. CONST. art. 8, § 2.

<sup>46</sup> 389 Mich. at 11-12, 203 N.W.2d at 460-61. The state equal protection clause, MICH. CONST. art. 1, § 2, was cited by plaintiffs along with the federal equal protection clause, U.S. CONST. amend. XIV, § 2, in an obvious invitation to adopt an independent and adequate state ground for the decision in a case based primarily on federal law. See Brief for Plaintiffs at 33, 56-57; Brief for Intervenors Steers, Wilson, Randall, Zeeb, and Laver at 10, 31. Plaintiffs' briefs did not rely at all on the phrase "maintain and support," which was without relevant prior judicial interpretation.

<sup>47</sup> 389 Mich. at 13-15, 203 N.W.2d at 461-67.

<sup>48</sup> *Id.* at 38, 203 N.W.2d at 473.

<sup>49</sup> *Id.* at 25-28, 203 N.W.2d at 468-69.

<sup>50</sup> *Id.* at 28-29, 203 N.W.2d at 469-70.



crimination; and, in an analysis anticipating Mr. Justice White's dissent in *Rodriguez*,<sup>51</sup> it also found the local control argument wanting on the more lax "rationality" standard, labeling as a "hoax" on poor districts the assertion that the deductible-millage system provided a local option to seek excellence.<sup>52</sup> Furthermore, the court asserted that less onerous alternatives were available to promote local control without gross discrimination. However, it cited an unlikely pair of alternatives, perfection of the deductible-millage formula or alteration of district boundaries.<sup>53</sup> The latter is obviously limited as a device for promoting either local control or greater equality, but could be used to eliminate some of the greatest disparities. As for the former, the court's suggestion that the deductible-millage formula might be perfected is forgivable, for none of the briefs mentioned that the formula inevitably discriminates. Among districts taxing at rates above the deductible millage, it discriminates in favor of the wealthy; among districts taxing at rates lower than the deductible millage, it discriminates in favor of the poorer districts. Both wealth-based discrimination and reverse discrimination are inherent in the formula; adjustments can only alter the point at which the discrimination is reversed.<sup>54</sup>

Since the action was for declaratory relief, the court declined to order an immediate remedy. It found the finance system unconstitutional, but would not go so far as to forbid unequal expenditures based on reasonable classifications.<sup>55</sup> Coming close to a finding of mootness, the court pointed out that its ruling applied only to a state aid statute that had been superseded during the pendency of the suit.<sup>56</sup> Obliquely giving its decision only prospective effect, it explained that it would "stand ready upon adoption of

<sup>51</sup> 411 U.S. 1, 59 (1973).

<sup>52</sup> 389 Mich. at 29-33, 203 N.W.2d at 470-71. Justice Williams waxed indignantly metaphorical on the last point:

[R]ecognizing that by "local control" may be meant the option to levy additional taxes for specially desired educational services, the validity of that argument must be met head-on. That just is not what the option is.

To begin with the school property tax is not a pleasure horse to ride into greener pastures, it is the work horse to cover the everyday rocky road of school finance. School district property taxes are the largest element in the combined state public school financing system. . . .

In addition this so-called option is not really an option at all for the poorer (per pupil) school districts. Because of the 50-mill tax limitation of Const 1963, art 9, § 6, and the low revenue per added mill levied, the greener pastures of the richer school districts can remain an ever receding mirage for the school district with low state equalized value per pupil.

. . . [T]he seemingly plausible argument of local control to permit school districts to opt for the greener pastures of education is really a heavy yoke for all school districts to bear and adds up to the major share of the state's burden to "maintain and support" free public schools. For the poorer school districts it is a hoax that they can follow the richer school districts into the green pastures. All in all, this Court finds no rationality justifying the substantial inequalities found.

*Id.* at 32-33, 203 N.W.2d at 471.

<sup>53</sup> *Id.* at 30-31, 203 N.W.2d at 470.

<sup>54</sup> See NEW EQUITY IN MICHIGAN SCHOOL FINANCE 6-8.

<sup>55</sup> 389 Mich. at 34, 203 N.W.2d at 472.

<sup>56</sup> *Id.* at 38, 203 N.W.2d at 473-74. The statute was a deductible-millage statute differing only slightly from the statute before the court. Mich. Pub. Act No. 258 (1972). It should not be confused with the power equalizing statute subsequently passed, Mich. Pub. Act No. 101 (1973).

a new school aid formula and before levy of school taxes to entertain . . . a petition to test the new combined [state and local] public school financing system, and, if appropriate, fashion suitable orders.”<sup>57</sup>

## 2. *The Second Decision*

Almost a year after its original decision, the Michigan Supreme Court decided that the case should not have been heard, and consequently dismissed it. There was some initial confusion about precisely what the grounds were for this decision, as the court issued an amendment of its one-sentence opinion one week after it was issued. In its amended decision, the court held that it had improvidently certified the questions upon which the case was argued.<sup>58</sup> Evaluated on its own terms, the final disposition of the case is not persuasive. The state rule on certified questions unmistakably gives the supreme court discretion to permit a lower court to certify a question on the motion of the governor.<sup>59</sup> There is, however, no discretion to deny the governor the right to seek declaratory relief in the trial courts and, if unsuccessful, to appeal to the supreme court in the usual fashion.<sup>60</sup> Hence, if the certification of questions were improvident, the proper disposition would seem to be to remand the case to the court that had certified the questions upon orders from the supreme court. Instead, the court dismissed the whole case.

This analysis suggests that the court did not feel compelled to dismiss the case because of a technicality.<sup>61</sup> Rather, the court seems to have recognized that the legislature, set in motion partly by the court's earlier decision, had moved as far and as fast as the court could reasonably have expected. The case had become moot, but for some reason the court was unwilling to so rule.<sup>62</sup> It may be that the court felt, not that its original decision to certify the questions had been improvident, but that to answer the questions at such a late date would be improvident. Understood in this light, the court stumbled a bit in its formal justification, but skillfully avoided either political credit or blame for a result achieved through forces the court had helped to set in motion.

<sup>57</sup> 389 Mich. at 38, 203 N.W.2d at 474.

<sup>58</sup> The first version recited that “a request of the Governor for an Advisory Opinion” had been improvidently granted. *Governor v. State Treasurer*, slip opinion at 1 (Mich., Dec. 7, 1973). The amended version said that “a request of the Governor for the certification of questions” had been improvidently granted. *Governor v. State Treasurer*, 390 Mich. 389, 212 N.W.2d 711 (1973) (amended order). The first version was clearly a mistake, as the Governor had not sued under the constitutional provision authorizing advisory opinions, MICH. CONST. art 3, § 8, but under another portion of the constitution that authorizes him to sue state officers or political subdivisions to restrain violations of constitutional rights. *See* MICH. CONST. art. 5, § 8.

<sup>59</sup> MICH. GEN. CT. R. 797.

<sup>60</sup> *See* MICH. CONST. art. 5, § 8; MICH. GEN. CT. R. 521.

<sup>61</sup> This view is bolstered by the fact that the court initially misstated the ground for decision.

<sup>62</sup> The concurring justices seem to have felt the case to be moot, 390 Mich. at 389 n.1, 401-02, 212 N.W.2d at 711 n.1, 717, but they were not content to decide the case solely on that ground. Rather, they reached the merits and disposed of them by reasoning similar to that of the majority of the United States Supreme Court in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). *See* 390 Mich. at 389, 212 N.W.2d at 711 (concurring opinion).

## II

## REFORM AND THE LEGISLATURE

While *Governor v. State Treasurer* languished in the courts, political forces were prodded to work toward an accommodation. In the very early stages of the litigation, the voters of the state faced an initiative proposition that would have amended the state constitution to require centralized state funding of public schools. Under this proposal, school districts would have been completely funded by the state except for a small "enrichment" millage available by local option. A separate amendment set forth in a companion initiative proposition would have authorized a graduated income tax to pay for the increased state spending. Although sponsored by the Michigan Education Association and endorsed by the Governor, the package failed badly. There were several reasons for this, but the funding issue was fundamental. The progressive income tax has been a partisan issue in Michigan for over a generation, with labor and Democrats pressing for it and business and Republicans resisting. The 1963 constitution accurately reflects the stalemate: it authorizes an income tax, but requires that it be a flat rate tax.<sup>63</sup> The Michigan Education Association proposal, designed to appeal to both parties, in fact worried both. The Republicans objected to the graduated tax. The Democrats, who are concentrated in industrialized areas, wanted the graduated income tax but feared that it would be defeated while the centralized funding of education provision passed; the result, as they saw it, would have been to transfer part of the cost of schools from industry to wage earners and consumers. In addition, there was widespread concern that a centralized funding plan might pose a threat to local control. While these fears alone might have defeated the initiatives, the Detroit school desegregation case sealed their fate. A month before the election, the United States district court indicated it was considering a multi-district remedy for school segregation in the predominantly black Detroit district. Some voters confused the funding issue with desegregation and opposed both. Others, more analytical, reasoned that multi-district desegregation would be less likely if a court were faced with a patchwork of tax bases, millage rates, and expenditure levels than if all school districts were centrally funded. The upshot of the matter was overwhelming defeat for centralized funding.

After the supreme court issued and then recalled its December, 1972, opinion that the deductible-millage formula was unconstitutional, the legislature began moving.<sup>64</sup> When the Governor and the Senate leadership ad-

<sup>63</sup> MICH. CONST. art. 9, § 7. Considerable progressivity has in fact been generated by a high personal exemption coupled with a fairly high nominal tax rate.

<sup>64</sup> The Michigan Senate acted first, under Republican leadership, but with bipartisan support, to design an effort-rewarding or power-equalizing system. Senate opposition, led by out-state Republicans (those from areas other than metropolitan Detroit) from low valuation, low effort districts receiving large amounts of state aid under the deductible-millage formula, lost an extended floor fight against the proposal. The Democratically-controlled House considered and rejected a full state funding plan before it tentatively approved a system of common per-pupil expenditures financed by local and state sources. The subsequent defection of Democrats from

vanced a power-equalizing bill, the former alliances among school districts crumbled. Schoolmen who had been polarized into high-valuation and low-valuation blocs were thrust into a debate in which interests were measured on a high-tax effort, low-tax effort continuum. Before a low effort bloc could solidify, the Governor had put together a coalition of education reformers and lobbyists from high effort districts, the most remarkable ones being spokesmen of the three districts the Governor had sued in his challenge of the deductible-millage system.<sup>65</sup> That coalition succeeded in passing the Governor's effort-rewarding statute,<sup>66</sup> named the Bursley Act after its chief legislative sponsor, the chairman of the Senate education committee.

The Bursley Act has two major characteristics: it equalizes operating revenues raised per pupil per mill in all but the wealthiest of districts, and it partially equalizes revenues for retiring bonded indebtedness for capital outlays. The formula for operating funds is phased in over three years. In the first year, 1973-74, combined local revenue and state aid are guaranteed to equal \$38 per pupil per mill for the first 22 mills. To state the guarantee differently, each district is given the revenue-raising power of a district with \$38,000 SEV per pupil.<sup>67</sup> This amounts to \$836 per pupil for all districts levying 22 mills. In 1974-75, the figures will be \$39 per pupil per mill for the first 25 mills. In 1975-76, the state will guarantee \$40 per pupil per mill without limitation on the number of mills. In all cases, any district which raises more per mill than the guaranteed amount keeps the excess revenue; there is thus no "recapture" provision, as is the case with pure power equalizing. In the school year preceding the implementation of the Bursley Act, the median millage in Michigan was approximately 24.5, yielding on the average about \$818 per pupil. By 1975-76, that levy will yield almost \$1,000 per pupil under the Bursley Act, an increase of 22.2 per cent.<sup>68</sup>

The formula for partially equalizing the ability to pay for capital outlays is essentially the same.<sup>69</sup> In effect, the state helps each district repay its bonded indebtedness as if it were a \$38,000 SEV per pupil district in 1973-74, or a \$39,000 SEV per pupil district in 1974-75. The amount of state aid for both operating and capital expenses is subject to a single 22 mill ceiling in 1973-74 and to a 25 mill ceiling in 1974-75. The statute simply does not discuss reimbursing districts for capital outlays in 1975-76, the year the ceiling is removed on operating millages. Low valuation districts with low operating millages and high debt retirement millages are particularly aided by this provision, which allows them to retire debts on schedule with reduced local tax effort and to divert the rest of their tax

high effort districts forced the House Democratic leadership to accept the basic approach of the Senate.

<sup>65</sup> See NEW EQUITY IN MICHIGAN SCHOOL FINANCE 28-30.

<sup>66</sup> Mich. Pub. Act No. 101 (1973).

<sup>67</sup> Only three per cent of Michigan pupils live in districts with an SEV per pupil greater than \$38,000. See NEW EQUITY IN MICHIGAN SCHOOL FINANCE app. I, at xii.

<sup>68</sup> *Id.* at 25-26.

<sup>69</sup> Mich. Pub. Act No. 101, § 27 (1973).

effort to operational funds.

Although it is still too early to evaluate the overall social impact of the new system, some observations can be made. Quite clearly, school finance will not hereafter be a function of the real property wealth of a district except in the handful of districts which have an SEV of more than \$40,000 per pupil. All districts now have a real choice of expenditure levels. The choice is not as unencumbered by noneducational considerations as one might wish however. Because they feel they cannot afford to raise local property taxes, districts with a high concentration of low income voters or with a high tax rate for non-school purposes, or both—as in Detroit—are less able than other districts to qualify for the higher levels of state aid their state taxes help pay for. Under statutes that predate the effort-rewarding formula, Michigan attempts to deal with these problems. A “municipal overburden” categorical aid provision in the school finance statute was retained.<sup>70</sup> While the amount of money authorized under the municipal overburden section is inadequate to achieve full equality of school taxing power, it is a modest step in that direction. The impact of property taxes on low income persons is eased by a “circuit-breaker” tax relief device passed in the same legislative session as the Bursley Act and applicable to all forms of property taxes, rather than to school taxes alone.<sup>71</sup> Under the “circuit-breaker” device the state grants an income tax credit to low income homeowners and renters. The credit amounts to 60 per cent of the amount by which the property taxes on a home exceed 3.5 per cent of the total household income.<sup>72</sup> Persons with incomes too low to take full advantage of the credit receive a cash rebate. Hopefully, the circuit-breaker device will reduce opposition to local school millages once the public understands that it is not forced to choose between educational quality and the living standards of the poor. Even after considering these leveling devices apart from the effort rewarding formula, it is likely that upper-middle class districts will be most able to afford the higher tax levies that produce state subsidies—to which all taxpayers in the state contribute. But that difficulty is not as gross as the inequalities under the deductible-millage formula, nor is it as defiant of legislative correction.

A special concern of educational reformers has been the impact on big-city school systems. The Detroit school district, with approximately 280,000 pupils, is the fifth largest in the United States.<sup>73</sup> In many ways it is the paradigmatic big-city district. Almost seventy per cent of its pupils are black. The voters are almost evenly divided between blacks and whites,

<sup>70</sup> *Id.* § 25. The municipal overburden section provides extra funds on a graduated basis for school districts that depend on a tax base which is subject to ad valorem taxes for noneducational public service expenditures in excess of 125 per cent of the statewide average tax rate for such purposes. Most of the municipal overburden money goes to Detroit. See note 75 *infra*.

<sup>71</sup> Mich. COMP. LAWS ANN. §§ 206.504—206.530 (Supp. 1974).

<sup>72</sup> The credit is 100 per cent of the excess for elderly persons and certain veterans. For renters, 17 per cent of the annual rent is attributed to property taxes. The maximum tax credit for a renter is \$500.

<sup>73</sup> See *Bradley v. Milliken*, 484 F.2d 215 (6th Cir.) (en banc), cert. granted, 42 U.S.L.W. 3306 (U.S. Nov. 20, 1973) (No. 73-434), for a detailed description of the Detroit school district in the context of a desegregation suit.

although the black percentage rises annually. A high percentage of the whites are elderly. As a result of the November, 1973, elections, a majority of the school board is black for the first time in history. Voter support for millages has been low for years, a reflection of racial tension, high municipal taxes, and a declining middle class population, among other things. The deductible-millage system, considered in isolation, neither favored nor disfavored Detroit as compared with the rest of the state, as the Detroit SEV per pupil is about the median of all districts in the state. Although the total appropriation for the municipal overburden is small, a large percentage of it goes to Detroit.<sup>74</sup>

Despite its superficial neutrality, the effort-rewarding method of state aid, which allows the voters to select the spending level, has a potentially severe impact on Detroit's school children. Voter resistance in 1972 and 1973 defeated a series of millage renewal proposals, dropping the school tax rate in Detroit to about 15 mills, one of the lowest in the state. Total tax burdens on Detroiters nevertheless remained heavier than elsewhere, due to the high level of expenditures for other public services. In a bill designed to encourage Detroiters to pass millage proposals, the legislature authorized the Detroit school board to levy a one per cent personal and corporate income tax whenever the property tax millage falls below 22 mills, the maximum millage subsequently equalized under the first phase of the new finance plan.<sup>75</sup> The tax effort represented by the school district income tax is credited under the Bursley Act as a millage of comparable revenue-raising power.<sup>76</sup> The legislature expected that Detroiters would pass a millage to eliminate an additional income tax once they realized that a much higher percentage of property taxes than income taxes is paid by industry and nonresidents. Two subsequent millage elections, one to restore the property tax to its pre-income tax level and the other to renew an expiring school millage, justified that faith. In the first election the millage passed comfortably, reversing a pattern of defeating school millages by growing margins; the second election saw the millage approved by more than two-thirds of the voters. Detroiters still bear an inordinate tax burden compared to their suburban neighbors, but realistically they can no longer hope to reduce it by cutting school taxes.

The reaction of school districts to the Bursley Act is not yet certain, but early indications are that differences among districts in per pupil expendi-

<sup>74</sup> The Bursley Act appropriated \$24,000,000 for all school districts eligible for municipal overburden payments. This was less than 2 per cent of the total funds appropriated by the Act. Detroit received \$20,350,000 of the municipal overburden fund, the equivalent of about 3½ mills of local taxation without state aid or 2 mills of local taxation with the state-guaranteed yield established by the Bursley Act. Municipal overburden money accounts for almost 8 per cent of Detroit's \$263,000,000 operating budget.

<sup>75</sup> The Detroit school district income tax was initially authorized in March, 1973. MICH. COMP. LAWS ANN. § 340.689 (Supp. 1973). The school board actually implemented the tax in July, 1973, but rescinded it retroactively after the voters, in November, 1973, approved a property tax millage which was retroactive to July. The income tax authorization was not at that time contingent upon the millage being below 22 mills. The statute was revised in March, 1974, to make it contingent upon the millage level in the district. Mich. Pub. Act No. 47 (1974).

<sup>76</sup> Mich. Pub. Act No. 101, § 22 (1973).

tures will be considerably lessened. While a year or two will have to pass before local district adaptations to the new system can be confidently evaluated, a scattering of recent millage elections may indicate the ultimate outcome. There is a clear movement on the part of low effort districts to raise taxes, a trend that was predictable, as these districts will lose much of their state aid unless they increase their local tax effort. The deductible-millage formula discouraged tax effort in these districts, while the new formula rewards it. Consequently, the sponsors of the Act felt no need to include a minimum millage requirement in the measure.<sup>77</sup> Returns from districts in the top quartile of tax effort are evenly mixed, with some districts retaining high taxes or even raising them, and others lowering them. While it is too early confidently to assess the reasons why some districts retained high taxes, the Governor's education advisor reports that local conditions seem to be decisive.<sup>78</sup> A need for major repairs to several buildings might influence one district to keep taxes high for one more year while another may not yet have educated its voters or board members to the fact that the same quality of schools can be had at a lower tax rate. Once the ceiling on state aid is removed, tax rates and per pupil expenditures are expected to vary within a much smaller range than under the deductible-millage system.

One side effect of the new system may be a reduction in the number of small school districts: to the extent that opposition to consolidation has been rooted in a desire to preserve low tax rates in high valuation districts, the basis for anti-consolidation sentiment will be almost completely eliminated once the new system is fully implemented.<sup>79</sup> The provision for partial equalization of bonded indebtedness millages is a more pointed but probably less significant incentive for consolidation. Since that section of the Act is expressly limited to districts which operate classes from kindergarten through twelfth grade,<sup>80</sup> the effect is to deny state aid for capital expenditures by districts operating only through grade eight, a class of districts generally considered too small to be able to offer a satisfactory program.

### CONCLUSION

It is impossible to say who won and who lost in the Michigan school finance litigation. It probably does not matter. The judicial position that the deductible-millage system was unconstitutional, transitory though that position proved to be, broke the legislative deadlock. Once legislators and school leaders could not be sure that the result of legislative stalemate would be the status quo, a new coalition was able to strike out on a new path under executive leadership. The resulting legislation is not perfect: it favors high income districts and districts with few competing demands for tax dollars.

<sup>77</sup> See NEW EQUITY IN MICHIGAN SCHOOL FINANCE 21.

<sup>78</sup> Telephone interview with Dr. James Phelps, Special Assistant to the Governor, Feb. 19, 1974.

<sup>79</sup> See NEW EQUITY IN MICHIGAN SCHOOL FINANCE 21. Opposition to consolidation may, of course, be based on other factors, such as perceptions of social class. See Scott, *School District Integration in a Metropolitan Area*, 4 EDUC. & URBAN SOC'Y 135 (1972).

<sup>80</sup> Mich. Pub. Act No. 101, § 27 (1973).

But, especially considered in conjunction with other statutory changes approved at the same legislative session, it reduces the irrationality and unfairness of the school finance system while making some degree of local control a reality in every district. In an imperfect world, this is not an unhappy result.